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In the
Supreme Court of the United States

October Term, 1955

No. 1156

The United States of America, ex rel. Ida Jan Bowers, as the Statutory Liquor Control, a Corporation,

Petitioner

vs.

Government Custom Canvas Co., U. S. Fire Insurance Company, a corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

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In the Supreme Court of the United States

OCTOBER TERM 1965

No. ————

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF THE ROBERTSON LUMBER COMPANY, A CORPORATION
Petitioner

VS.

CONTINENTAL CASUALTY COMPANY; U. S. FIRE INSURANCE COMPANY, FOREIGN CORPORATIONS
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The United States of America, for the use and benefit of The Robertson Lumber Company, a corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on February 1, 1965.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit entered its opinion and judgment on the first day of February, 1965, as reported in 340 F. 2d 958, and is found in Appendix A. The opinion of the Court below was rendered on an appeal from a decision of the United States District Court for the District of North Dakota, Northwestern Division, dated November 26, 1963, and is found in the record (pp. 29-37), and from a judgment of dismissal as to the respondents herein, entered by the United States District Court on December 26, 1963, and amended on September 23, 1964, which decision is reported at 223 F. Supp. 435.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Eighth Circuit was entered on the first day of February, 1965 (Appendix B). The jurisdiction of the United States Supreme Court is invoked under *Title 28 United States Code*, Section 1254(1) (62 Stat. 928, June 15, 1948, ch. 646).

FEDERAL JURISDICTION

The petitioner herein originally brought suit in the United States District Court, District of North Dakota, Northwestern Division, against the respondents herein, Continental Casualty Company and U. S. Fire Insurance Company, and three contracting companies as principals on bonds issued by the respondents herein. The petitioner's claim is for the value of materials and merchandise sold and delivered to a Capehart housing project at the Minot Air Force Base, Minot, North Dakota. Suit was brought under

the jurisdictional portion of the Miller Act, *40 United States Code*, Section 270 (49 Stat. 794, August 24, 1935, ch. 642). Jurisdiction in the federal court also attached by virtue of *Title 28 United States Code*, Section 1352 (62 Stat. 934, June 25, 1948, ch. 646).

SUMMARY OF THE MATTER INVOLVED

Suit was brought by the United States of America on behalf of The Robertson Lumber Company against a general contractor, Cedric Sanders Company, a foreign corporation; Sanders-Keiter, a joint venture; and Cedric Sanders-Sanders-Coast, a joint venture, and their sureties, Continental Casualty Company and U. S. Fire Insurance Company for materials furnished by The Robertson Lumber Company and delivered to a Capehart Housing project at the Minot Air Force Base, Minot, North Dakota, in 1960.[1] Suit was one count or claim for the sum of Thirty-two Thousand Two Hundred Ninety-eight and 89/100 ($32,298.89) Dollars, with interest thereon from November 30, 1960. Suit was originally brought under the Miller Act, *40 United States Code*, Section 270b (49 Stat. 794, August 24, 1935, ch. 642(2)).[2] All of the defendants in said action, including the respondents herein, filed answers to the plaintiff's complaint.

On May 14, 1963, the respondent surety companies

---

[1]The Capehart Act is found at *Title 42 United States Code*, Section 1594 (69 Stat. 651, August 11, 1955, ch. 783, Title IV, Section 403; Aug. 95-, ch. 1029, Title V, Section 506(b)-(d), 507, 70 Stat. 1110) and is set out at Appendix C.

[2]This action was commenced but not tried prior to the decision of the Court of Appeals for the Eighth Circuit in *Continental Casualty Company v. U. S. for the Use of Robertson Lumber Company* (CA-8 1962) 305 F. 2d 794, certiorari denied 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231.

made and filed a motion for dismissal of the action as to them upon the grounds that the bond involved in the particular proceeding contained provisions for notice to be given by materialmen as a condition precedent to a right of action on the bond; that the plaintiff had wholly failed to give the notice required by the bond and that such failure constituted a complete defense, and further that the Miller Act, *Title 40 United States Code,* Sections 270a and b (49 Stat. 794, August 24, 1935, ch. 642) did not provide for jurisdiction over actions brought on a Capehart bond.

The United States District Court granted the motion to dismiss as to the surety companies, the respondents herein, holding that the notice provisions of the bond were not satisfied and that such failure precludes recovery under the bond.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit on the order of the District Court dismissing the surety companies (the respondents herein) from the action. On appeal, the appellant, The Robertson Lumber Company (the petitioner herein), contended:

> 1. That the Miller Act, *Title 40 U.S.C.*, Sections 270a and b (49 Stat. 794, August 24, 1935, ch. 642)[3] applies to actions on bonds issued under the Capehart Act in its entirety,
>
> or
>
> 2. In the alternative, and if the Miller Act did not

[3]Holding that the Miller Act applied to actions under a Capehart bond would require, for the purposes of this action, a reversal by the Court of Appeals for the Eighth Circuit of the position taken in *Continental Casualty v. U. S. for the Use of Robertson Lumber Company* (8th Circuit, 1962), 305 F. 2d 794, certiorari denied, 371 U.S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231.

apply, the jurisdiction of the United States District Court in actions on a Capehart bond were concurrent with the State Court pursuant to *Title 28 United States Code,* Section 1352 (62 Stat. 934, June 25, 1948, ch. 646).[4]

and

3. Therefore, and because of the concurrent jurisdiction between the federal courts and the state courts, actions on Capehart bonds should be determined by the law in effect in the state where the contract involved was performed.

The Court of Appeals for the Eighth Circuit affirmed the lower court without discussing the points raised by the appellant (the petitioner herein) on the appeal. A petition for rehearing and a request for a review en banc was filed, and was denied by the Court on February 26, 1965.

QUESTIONS PRESENTED

1. Do the courts of the several states have concurrent jurisdiction with the United States District Courts in suits brought on bonds issued under the Capehart Act pursuant to *Title 28 United States Code,* Section 1352 (62 Stat. 934, June 25, 1948, ch. 646)?

2. Are suits brought under Capehart bonds, either in the United States District Courts or in the courts of the several states, governed by the laws of the state where the work covered by the bond was performed?

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[4]This is in accord with the holding of the Eighth Circuit Court of Appeals in *Continental Casualty v. U. S. for the Use of Robertson Lumber Co., supra.*

REASONS FOR GRANTING THE WRIT

Since the Court of Appeals for the Eighth Circuit decided *Continental Casualty v. United States for the Use of Robertson Lumber Company,* 305 F. 2d 794, certiorari denied, 371 U.S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231, the same Court of Appeals has decided three other cases, in addition to the present matter, on the question of the exclusive jurisdiction of the District Court vis-a-vis the concurrent jurisdiction of the United States District Court and the state courts as provided by *Title 28 U.S.C.,* Section 1352 which bear significantly on both questions raised in this appeal. These three cases, together with the first Robertson case are cited as the authority of the Eighth Circuit Court in affirming the decision of the District Court in this matter. These three cases in the order they were decided are: *Continental Casualty Company v. Allsop Lumber Company* (CA-8, 1964), 336 F. 2d 445, certiorari denied, 379 U.S. 968, 85 S. Ct. 662, 13 L. Ed. 2d 561; *Koppers Company, Inc. v. Continental Casualty Company, Inc.* (CA-8 1964), 337 F. 2d 499; and *Missouri-Illinois Tractor and Equipment Company v. D & L Construction Company, et al.* (CA-8 1964), 337 F. 2d 507.

Because of the failure on the part of the court below in their affirming opinion to discuss or pass on the points raised in this appeal, and because the affirming opinion of the court below rests directly on the four decisions cited above, it would seem appropriate to set out here that portion of the most recent opinion of the Court of Appeals for the Eighth Circuit which expresses the doctrine on the point raised in this appeal as it is presently established in the Eighth Circuit. This is best expressed in the *Koppers* case which was decided October 22, 1964. That holding is as follows:

> "We therefore adhere to our holding in Allsop. That case, this one, the result we reached in Robertson, and our companion Missouri-Illinois decision, 337 F. 2d 507, establish as the present law of this Circuit with respect to Capehart payment bond actions the following: The proper federal court has jurisdiction under Title 28 U.S.C. Section 1352 over an action on a Capehart bond. Section 2(b) of the Miller Act, 40 U.S.C. Section 270b(b), has application to a Capehart bond action and vests jurisdiction over that action exclusively in the federal court. Out-of-state service is effective. The limitation period set forth in Section 2(b) of the Miller Act is applicable despite the presence of a specified longer period in the bond itself. But the dual notice requirement of a Capehart bond, being more stringent than the notice provisions of the Miller Act, is valid and effective."

1. The opinion of the Court of Appeals for the Eighth Circuit on the question of exclusive jurisdiction of the federal court in an action on a Capehart bond is in direct conflict with the decision of the Supreme Court of the State of North Dakota in *Ireland Lumber Yard v. Progressive Contractors, et al.* (ND), 122 N. W. 2d 554 where the Court held (at p. 559 of the opinion):

> "* * * Nevertheless, the District Court of the United States had jurisdiction under the concurrent jurisdiction conferred upon it by 28 U.S.C.A. Section 1352, which provides that the District Courts of the United States shall have original jurisdiction concurrent with state courts of any action on a bond executed under any law of the United States. The case does not hold that the State court does not have jurisdiction."

And then, at page 561 of the opinion, the Supreme Court of the State of North Dakota held:

> "We believe it is well established that the Capehart Act bond is not controlled by the Miller Act and that the State District Court in and for the county of the state in which the project, or any part thereof, is situated, has jurisdiction as provided by the bond."

The opinion of the lower court is in conflict with the Supreme Court of the State of New Mexico in *Allsop Lumber Company v. Continental Casualty Company,* 385 Pac. 2d 625, where that Court held, beginning at page 628 of the opinion:

> "We are aware that the two circuit court opinions referred to[5] did not directly hold that the state courts had concurrent jurisdiction in actions such as the instant one. However, no other possible result could be reached on this question in the light of the conclusion arrived at by these courts that compliance with the provisions of the Miller Act as to notice were not applicable to Capehart bonds."

The opinion of the court below is in conflict with *Lasley v. U. S. for the Use of Westerman* (CA-5 1960), 285 F. 2d 98 where the Court held:

> "However, even assuming, arguendo, that this is not true, we find that the district court nevertheless had jurisdiction to entertain this suit under the concurrent jurisdiction conferred upon it by 28 U.S.C.A. Section 1352. For this reason there is no merit in the arguments put forth by appellants."

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[5]The two cases referred to by the court are *U. S. for the Use of Miles Lumber v. Harrison and Grimshaw Construction* (CA-10 1962), 305 F. 2d 363, certiorari denied 371 U.S. 920, 83 S. Ct. 287, 9 L. Ed. 2d 229, and *Continental Casualty v. U. S. for the Use of Robertson Lumber Company* (CA-8 1962), 305 F. 2d 794, certiorari denied 371 U.S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231.

The opinion of the court below is in apparent conflict on this question with the Court of Appeals for the Second Circuit in *U. S. v. Aetna Casualty and Surety Company* (CA-2 1962), 297 F. 2d 665.

2. The opinion of the court below, and its companion decisions on the question of jurisdiction of the United States District Court in actions on Capehart bonds, and the conflicting decisions of the state courts of North Dakota and the State of New Mexico as hereinbefore set forth, raise a question of paramount importance which should be review and determined by this Court.

The confusion resulting from the present state of the law on the question presented in this matter is best illustrated in the following cases:

A. *Travis Equipment v. D & L Construction Company* (District Court Missouri—1963), 224 F. Supp. 410. The District Court dismissed from its calendar at least four cases brought on a Capehart bond which were commenced in the State court for the State of Missouri, and removed to the federal court. The basis for the removal was lack of jurisdiction in the state court and subsequent lack of jurisdiction in the federal court on a removed case. In so doing the district court, speaking through Judge Oliver, said:

> "We note in passing that the possibility of the 'judicial chaos' to which we alluded on page 474 of 215 F. Supp. is developing at a predictably rapid rate. Not only are several of the United States Courts of Appeal in open and complete conflict, but the first two of the potential fifty states appellate courts to decide the basic question of jurisdiction over the subject matter are also in open conflict. * * *"

B. In unreported cases in North Dakota, the United States District Court for the District of North Dakota, Northeastern Division, remanded to the state court, on its own motion, two actions brought on Capehart bonds commenced in the state court and removed to the federal court.[6]

C. In the State of North Dakota one case, *Ireland Lumber Yard v. Progressive Contractors, et al.* (ND), 122 N. W. 2d 554, was remanded by the Supreme Court of that state for further proceedings in the District Court, and is still pending before the District Court for proceedings as directed by the Supreme Court of North Dakota.

The opinion of the court below has therefore resulted in the federal courts within the Eighth Circuit holding that jurisdiction in suits on Capehart bonds is exclusively in the federal court. The state courts of New Mexico and North Dakota have held that the state courts can assume jurisdiction of actions on Capehart bonds by virtue of *Title 28*, Section 1352 of the *United States Code*. The trial court in this matter was aware of this uncertainty at the time the respondents herein were dismissed, when the trial court, speaking through Hon. George S. Register, said:

"The law in North Dakota on this point existing at the time of the decision in Ireland's was also in exist-

[6]The two actions are *The Robertson Lumber Company, a corporation, v. Progressive Contractors, Inc., a corporation, and Continental Casualty Company, a corporation, and Fidelity and Casualty Company of New York, a corporation,* U. S. District Court, District of North Dakota, Northeastern Division, Civil No. 3883; and, *The Robertson Lumber Company v. Wilshire Contractors, Inc., a corporation, and Continental Casualty Company, a corporation,* United States District Court, District of North Dakota, Northeastern Division, Civil No. 3882.

> ence at the time Robertson Lumber Company was before the trial court and the Court of Appeals for this circuit. I have found no reference to any such state law (regarding notice to sureties) and neither of the Robertson Lumber Company opinions reported at 196 F. Supp. 171 and 305 F. 2d 794, and apparently the point was not raised therein. It is indeed unfortunate that this uncertainty exists, as there is at the present time a substantial amount of litigation in this court involving Capehart housing" (R. p. 36).

The uncertainty referred to by the trial court in its opinion above quoted has not resolved this question as between the United States District Courts and the courts of the several states. It is submitted that this question is of significant importance. There is an obvious conflict between the court below and the supreme courts of two states so as to justify this court in granting this petition and determining the matter.

3. The opinion in the court below is in conflict with applicable decisions of this Court as to the interpretation of the statutes involved. The controlling doctrine in this case as decided by the court below is found in the *Koppers* case (*supra*) which is quoted herein. The court below in the *Koppers* case says:

> "The proper federal court has jurisdiction under Title 28 U.S.C. Section 1352 over an action on a Capehart bond. Section 2(b) of the Miller Act, 40 U.S.C. Section 270b(b) has application to a Capehart bond action and vests jurisdiction over that action exclusively in the federal court. * * *"

The above quoted portion of the opinion of the court below in the *Koppers* case applies a portion of the Miller

Act, *40 U.S.C.*, Sections 270a and 270b to actions on Capehart bonds, and is thus contrary to the previous expressions of the court below already alluded to. It is also contrary to the provisions of *Title 28 U.S.C.*, Section 1352 which confers concurrent jurisdiction upon the United States District Court and the courts of the several states.

The Court then says in the *Koppers* decision:

> "The limitation stage set forth in Section 2(b) of the Miller Act is applicable despite the presence of a specified longer period in the bond itself. But the dual notice requirement of a Capehart bond, being more stringent than the notice provisions of the Miller Act, is valid and effective."

The court below is here applying a portion of the Miller Act relating to the limitation period and ignores a contrary provision in the Capehart bond itself. The court below then applies the notice requirement as provided in the Capehart bond, and ignores the notice provisions of the Miller Act.

The result of the opinion of the court below, as expressed in the *Koppers* case which has been applied as the controlling doctrine in this action, is to apply so much of *Title 28 U.S.C.*, Section 1352 as gives jurisdiction to United States District Court, and ignore the remaining portion of the statute which confers concurrent jurisdiction upon the state courts. Further, the court below applies only that portion of the Miller Act which vests exclusive jurisdiction in the United States District Court.

Admittedly, the comments of the court below as to the limitation period and the dual notice are not germane to the questions presented by this petition but it illustrates that the court below has used a portion of *Title 28 U.S.C.*,

Section 1352, a portion of the Miller Act, *40 U.S.C.*, Sections 270a and 270b, and a portion of the Capehart bond itself in formulating what the court below proclaims to be the controlling doctrine in actions brought on Capehart bonds.

This interpretation by the court below is in conflict with the decisions of this Court in *Richards v. U. S.*, 82 S. Ct. 585, 369 U.S. 1, 7 L. Ed. 2d 492, and *Ex Parte in the Matter of the Public National Bank of New York*, 278 U.S. 101 and 104, 73 L. Ed. 202, 49 S. Ct. 43, at pg. 44, where this Court has rejected piecemeal or isolated interpretations of statutes. This Court has required courts to look at the provisions of the whole law, and to its object and policy. It is submitted that the opinion of the court below so far departs from the basic rules of statutory construction so as to justify this Court in reviewing this matter or in determining the issue.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 17,603

United States of America, for the Use and Benefit of The Robertson Lumber Company, a North Dakota Corporation,

Appellant,

v.

Continental Casualty Company, U. S. Fire Insurance Company, Foreign Corporations,

Appellees.

[February 1, 1965.]

Before Vogel, Matthes and Ridge, Circuit Judges.

Appeal from the United States District Court for the District of North Dakota.

Per Curiam.

The judgment of the District Court, mandated at 223 F. Supp. 435, l.e. 438, is affirmed on the basis of the District Court's opinion there set forth; and this Court's opinions in *Continental Casualty Company v. United States for the use of Robertson Lumber Company* (8 Cir. 1962), 305

F. 2d 794, cert. den. 371 U.S. 922; *Continental Casualty Company v. Allsop Lumber Co., Inc.* (8 Cir. 1964), 336 F. 2d 445, cert. den. Jan. 19, 1965; *Koppers Company v. Continental Casualty Company* (8 Cir. 1964), 337 F. 2d 499; and *Missouri-Illinois Tractor & Equipment Co. v. D & L Const. Co. & Associates, et al.,* (8 Cir. 1964), 337 F. 2d 507.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment)

United States Court of Appeals

For the Eighth Circuit

No. 17,603. September Term, 1964

United States of America, for the Use and Benefit of The Robertson Lumber Company, a North Dakota Corporation,

Appellant,

vs.

Continental Casualty Company, and U. S. Fire Insurance Company, Foreign Corporations.

Appeal from the United States District Court for the District of North Dakota.

This Cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On Consideration Whereof. Is is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 1, 1965.

APPENDIX C

Capehart Act

Title 42, U. S. Code, Section 1594

Subchapter XI—Housing for Military Personnel. Section 1594. Contracts for Construction.

(a) Contract provisions; competitive bids.

The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of Section 270a of Title 40, and no addi-

tional bonds shall be required under such section. Before the secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in Section 152 of Title 41.

(b) Definition of "eligible bidder."

For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

(c) Acquisition of capital stock of property covered by mortgage.

Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under sections 1748-1748g and 1748h-1 of Title 12, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

(d) Opinion as to title to property; guarantee; title search and title insurance.

On request by the Secretary of Defense, the Attorney General shall furnish to the Secretary of Defense, or his designee, an opinion as to the sufficiency of title to any property on which it is proposed to construct housing, or on which housing has been constructed, under this section. If the opinion of the Attorney General is that the title to any such property is good and sufficient, the Secretary of Defense is authorized to guarantee, or enter into a commitment to guarantee, the mortgagee, under a mortgage on such property which is insured under sections 1748-1748g and 1748h-1 to 1748h-3 of Title 12, against any losses that may thereafter arise from adverse claims to title. None of the proceeds of any mortgage loan hereafter insured under such sections 1748-1748g and 1748h-1 to 1748h-3 of Title 12 shall be used for title search and title insurance costs: *Provided,* That if the Secretary of Defense, or his designee, determines in the case of any housing project, that the financing of the construction of such project is impossible unless title insurance is provided, the Secretary may provide for the payment of the reasonable costs necessary for obtaining title search and title insurance. Any payments by the Secretary hereunder shall be made from the revolving fund established under section 1594a(g) of this title. Any determination by the Secretary under the foregoing proviso shall be set forth in writing, together with the reasons therefor. The committees on Armed Services of the Senate and House of Representatives shall be promptly notified of each such determination, and of the amount of any payment made by the Secretary for title search and title insurance costs. Aug. 11, 1955, c. 783, Title IV, Sec. 403, 69

Stat. 651; Aug. 7, 1956, c. 1029, Title V, Sections 506(b)-(d), 507, 70 Stat. 1110; Aug. 10, 1959, Pub. L. 86-149, Title IV, Sec. 415, 73 Stat. 323.

Section 1594a. Acquisition of Land or Housing Financed Under Armed Services Housing Mortgage Insurance Fund.

(a) Purchase price.

Whenever the Secretary of Defense or his designee deems it necessary for the purpose of this subchapter, he may acquire by purchase, donation, condemnation, or other means of transfer, any land or (with the approval of the Federal Housing Commissioner) any housing financed with mortgages insured under the provisions of sections 1748-1748h of Title 12 as in effect prior to August 11, 1955. The purchase price of any such housing shall not exceed the Federal Housing Commissioner's estimate of the replacement cost of such housing and related property (not including the value of any improvements installed or constructed with appropriated funds) as of the date of final endorsement for mortgage insurance reduced by an appropriate allowance representing the estimated cost of repairs and replacements necessary to restore the property to sound physical condition, as determined by the Secretary of Defense or his designee upon the advice of the Commissioner: *Provided,* That in any case where the Secretary or his designee acquires a project held by the Commissioner, the price paid shall not exceed the face value of the debentures (plus accrued interest thereon) which the Commissioner issued in acquiring such project.

(b) Housing at or near a military installation.

Notwithstanding any provision of subsection (a) of this section to the contrary, the Secretary of Defense or his designee shall, in the manner provided in subsection (a) of this section, acquire by purchase, donation, or other means of transfer or, if the parties cannot agree upon terms for acquisition by such means, by condemnation, any housing constructed under the mortgage insurance provisions of section 1748-1748h of Title 12 (as in effect prior to August 11, 1955) which is located at or near a military installation where the construction of housing under the Armed Services Housing Mortgage Insurance Program has been approved by the Secretary.

(c) Condemnation; procedures; deposit; payment; interest.

(d) Occupancy; use, or improvement of property before approval of title.

Property acquired under this section may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 255 of Title 40.

(e) Release of accrual requirements for replacement, taxes, and hazard insurance reserves.

The Secretary or his designee may, in the case of any housing acquired or to be acquired under this section, make arrangements with the mortgagee whereby such mortgagee will agree to release and waive all requirements of accruals for reserves for replacement, taxes, and hazard insurance provided for under the corporate charter and indenture

agreement with respect to such housing, upon the execution of a written agreement by the Secretary or his designee that the purposes for which such reserves and other funds were accrued will be carried out.

(f) Use as public quarters or lease of housing; deposit of amounts and rental charges.

Any housing acquired under this section may be (1) assigned as public quarters to military personnel and their dependents; or (2) leased to military and civilian personnel for occupancy by them and their dependents, upon such terms and conditions as will in the judgment of the Secretary of Defense or his designee be in the best interest of the United States, without loss to military personnel of their basic allowance for quarters or appropriate allotments. Amounts equal to the quarters allowances or appropriate allotments of military personnel to whom such housing is assigned as public quarters under clause (1), and the rental charges realized under clause (2), shall be deposited in the revolving fund created by subsection (g) of this section.

(g) Creation of revolving fund; purpose; deposits.

There is created a fund which shall be used by the Secretary of Defense or his designee as a revolving fund for the purpose of paying for housing and related property acquired under this section, paying interest, principal, mortgage insurance premiums, and other obligations (except those for maintenance and operation) with respect to such housing, and paying expenses incurred in the alteration, improvement, rehabilitation, and repair of such housing. The amounts and charges referred to in the last sentence of subsection (f) of this section, and any savings realized

in the operation of Section 1594b of this title, shall be deposited in such fund. For the purposes of the preceding sentence, the term "savings realized in the operation of section 1594b of this title" means the difference between the amount made available for payments under section 1594b of this title and the amount actually used in making such payments.

(h) Capital for revolving fund.

The Secretary of the Treasury is authorized and directed to establish on the books of the Treasury Department the revolving fund created pursuant to the authority of this section. To provide capital for such fund, there is authorized to be appropriated a sum not to exceed $50,000,000.-00 and the Secretary of Defense, with the approval of the President, is authorized to transfer from unexpected balances of any appropriations of the military departments not carried to the surplus fund of the Treasury such sums as may be determined by the Secretary of Defense to be necessary to provide adequate capital for the revolving fund. (Aug. 11, 1955, ch. 783, title IV, Sec. 404, 69 Stat. 652; Aug. 3, 1956, ch. 939, title IV, Sec. 420, 70 Stat. 1019; Aug. 7, 1956, ch. 1029, title V, Sec. 512, 70 Stat. 1111; July 12, 1957, Pub. L. 85-104, title V, Sec. 504, 71 Stat. 303; Aug. 20, 1958, Pub. L. 85-685, title V, Sec. 513 (d), 72 Stat. 773.)

Section 1594b. Maintenance and operation of housing; use of quarters; payment of principal, interest, and other obligations.

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this

subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest, and other obligations, except those of maintenance and operations, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed $21,000,000 per month: *Provided*, that, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month. (Aug. 11, 1955, ch. 783, title IV, Sec. 405, 69 Stat. 653; Aug. 7, 1956, ch. 1029, title V, Sec. 508, 70 Stat. 1110.)

Section 1594c. Services of architects and engineers; use of appropriations; acquisition of sites.

Whenever the Secretary of Defense or his designee determines that it is desirable in order to effectuate the purposes of this subchapter, the Secretary is authorized, without regard to the civil service and classification laws, to procure, by negotiation or otherwise, the services of architects and engineers, or organizations thereof, under such arrangements as he deems desirable, but at an expense not in excess of that permissible under the schedule of fees allowed from time to time by the Public Housing Administration in connection with projects assisted under the United States Housing Act of 1937, as amended. Such services may include the development of plans, drawings, and specifications for family housing under this subchapter and other services in connection therewith: *Provided*, That such

plans, drawings, and specifications may include the use on any project to be constructed under this subchapter of alternate materials or alternate types of construction, including prefabrication, that provide substantially equal value and conform to standards established by the Federal Housing Commissioner: *Provided, further,* That such plans, drawings, and specifications when developed pursuant to arrangements made under this section after August 7, 1956, shall follow the principle of modular measure, in order that the housing may be built by conventional construction, on-site fabrication, factory precutting, factory fabrication, or any combination of these construction methods: *Provided further,* That the Secretary may designate certain sites or parts thereof for family housing to be furnished from prefabricated houses or housing components. Such arrangements may include provision for advance or progress payments, for payment by third parties, for payment by the Government of any such compensation as is not paid for by third parties, and shall include provision for reimbursement by third parties to the Government of any compensation or other expenses paid by the Government pursuant to this section, and may include other provisions for compensation. Any public works appropriations now or hereafter available to the Departments of the Army, Navy, or Air Force or the Coast Guard may be obligated by the respective departments or the Coast Guard for these purposes. Reimbursements to the Government on account of payments made pursuant to this section shall be made to appropriations against which such payments were charged. The Secretary is further authorized to advance or pay to the Federal Housing Administration its "Appraisal and Eligibility Statement" fees in connection with such family housing. The Secretary is further authorized to enter

into arrangements by contract or otherwise for eventual acquisition by the Government, without cost to the Government of all right, title, and interest in sites on which housing is constructed pursuant to this subchapter and improvements thereon. (Aug. 11, 1955, ch. 783, title IV, Sec. 406, 69 Stat. 653; Aug. 7, 1956, ch. 1029, title V, Sec. 509, 70 Stat. 1110.)

Section 1594d. Appropriations; use of quarters allowances.

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1594-1594c of this title.

(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section. (Aug. 11, 1955, ch. 783, title IV, Sec. 407, 69 Stat. 653.)

Section 1594e. Definitions.

(a) Wherever the terms "Secretary of Defense" or "Secretary" or "Secretary of the Army, Navy, or Air Force" appear in this subchapter or in sections 1748-1748g and 1748h-1 of Title 12, they shall be deemed to mean the Secretary of the Treasury in the case of the application of the provisions of this subchapter or of sections 1748-1748g and 1748h-1 of Title 12, for the benefit of the United States Coast Guard.

(b) Wherever the term "armed services" appears in this subchapter it shall be deemed to include the United States Coast Guard. (Aug. 11, 1955, ch. 783, title IV, Sec. 409, 69 Stat. 654.)

Section 1594f. Net floor area limitations.

In the construction of housing under the authority of this subchapter and sections 1748-1748g and 1748h-1 of Title 12, the maximum limitations on net floor area for each unit shall be the same as the net floor area limitations prescribed by law (at the time plans and specifications for such construction are begun) for public quarters built with appropriated funds under military construction authority. (Aug 11, 1955, ch. 783, title IV, Sec. 410, as added Aug. 7, 1956, ch. 1029, title V, Sec. 510, 70 Stat. 1110, and amended July 12, 1957, Pub. L. 85-104, title V, Sec. 503, 71 Stat. 303.)

Section 1594h. Purchase of family housing for assignment as public quarters; space and cost limitations.

The Secretary of the Army is authorized to purchase out of appropriations available for military construction family housing including necessary land at, or near, military tactical installations for assignment as public quarters to military personnel and their dependents. Not more than 300 units of such housing may be purchased under this section. Space limitations per unit will be in accordance with subsections (a), (b), and (c) of section 4774 of Title 10, and cost limitations as now or hereafter established for military housing constructed with appropriated funds. (Pub. L. 85-241, title I, Sec. 103, Aug. 30, 1957, 71 Stat. 534.)

Section 1594i. Authorization of number of family housing units.

Notwithstanding the provisions of any other law, and effective July 1, 1958, no family housing units shall be contracted for or acquired at or in support of military in-

stallation or activities unless the actual number of units involved has been specifically authorized by an annual military construction authorization Act except (1) housing units acquired pursuant to the provisions of section 1594a of this title (2) housing units leased, utilizing available operation and maintenance appropriations, for terms of one year, whether renewable or not, or for terms of not more than five years pursuant to the provisions of section 171z-3 of Title 5. (Pub. L. 85-241, title IV, Sec. 406 (a), Aug. 30, 1957, 71 Stat. 556; Pub. L. 85-685, title V, Sec. 512, Aug. 20, 1958, 72 Stat. 662.)

Section 1594j. Inadequate quarters.

(a) Occupancy on rental basis without loss of basic allowance for quarters.

* * * * *

(b) Administration.

The provisions of this section shall be administered under regulations approved by the President.

(c) Designation as rental housing.

The Secretaries of the Army, Navy, and Air Force for the respective military departments, the Secretary of the Treasury for the Coast Guard when the Coast Guard is operating as a service in the Treasury Department, the Secretary of Commerce for the Coast and Geodetic Survey, and the Secretary of Health, Education and Welfare for the Public Health Service (hereafter referred to as the "Secretaries"), are each authorized, subject to standards established pursuant to subsection (b) of this section, to designate as rental housing such housing as he may determine to be inadequate as public quarters.

(d) Leasing of housing units.

The Secretaries are each further authorized, subject to standards established pursuant to subsection (b) of this section, to lease inadequate housing to personnel of any of the mentioned services for occupancy by them and their dependents. The housing facilities leased, as herein provided, shall not be required to have been constructed with funds derived from appropriations specifically made for the purpose of the construction of rental housing for personnel of the services mentioned.

(e) Alteration, improvement, or disposition of housing units.

All housing units determined pursuant to subsection (c) of this section to be inadequate shall, prior to July 1, 1961, either be altered or improved so as to qualify as public quarters, or be demolished or otherwise disposed of.

(f) Housing financed with mortgages insured under title VIII of the National Housing Act.

This section shall have no application to any housing financed with mortgages insured under the provisions of title VIII of the National Housing Act as in effect prior to the enactment of the Housing Amendments of 1955. (Pub. L. 85-241, Title IV, Sec. 407, Aug. 30, 1957, 71 Stat. 556; Pub. L. 85-685, Title V, Sec. 516, Aug. 20, 1958, 72 Stat. 664.)

APPENDIX D

Miller Act

Title 40, U. S. C., Section 272.

Section 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor";

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States. (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall

be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, ch. 642, Sec. 1, 49 Stat. 793.)

Section 270b. Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said pay-

ment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law, to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug 24, 1935, ch. 642, Sec. 2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, Sec. 1, 73 Stat. 279.)

Section 270c. Same; right of person furnishing labor or material to copy of bond.

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials

for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. (Aug. 24, 1935, ch. 642, Sec. 3, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, Sec. 2, 73 Stat. 279.)

Section 270d. Same; definition of "person".

The term "person" and the masculine pronoun as used in sections 270a-270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations. (Aug. 24, 1935, ch. 642, Sec. 4, 49 Stat. 794)

Section 270e. Same; waiver of sections 270a-270d with respect to Army, Navy, Air Force, or Coast Guard contracts.

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive sections 270a-270d of this title with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, materiel, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of such contracts as to payment or title. (April 29, 1941, ch. 81, 55 Stat. 147; June 3, 1955, ch. 129, 69 Stat. 83.)

APPENDIX E

Title 28, U. S. C., Section 1352.

Section 1352. Bonds executed under federal law.

The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States. (June 25, 1948, c. 646, 62 Stat. 934.)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1156

THE UNITED STATES OF AMERICA for the Use and Benefit of the Robertson Lumber Company, a Corporation,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY; U. S. FIRE INSURANCE COMPANY, Foreign Corporations,
Respondents.

BRIEF

In Resistance to Granting the Writ to the United States Court of Appeals for the Eighth Circuit.

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CITATIONS.

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In Resistance to Granting the Writ to the United States Court of Appeals for the Eighth Circuit.

The principal question involved in this case, and indeed the only question involved in the case, is whether or not a supplier or material man has the right of recovery against a surety on a bond required under a so-called Capehart Act (Title 42, U. S. C., § 1594 (a)) construction contract where the material men or persons furnishing labor failed to comply with the terms of the bond as to notice. This Writ to review this action, which question has been answered in the negative by both the Eighth

and Tenth Circuits and by inference by this Court (in denying certiorari when this question was presented to it in 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231) is being resisted on the following grounds:

1. There is no conflict on the question involved between the circuits or between the circuits and the state, and this question has been determined heretofore;

2. That the question is moot, anyway, because the Capehart Act is no longer operative; and

3. That the questions posed by the Petitioner are outside the scope of the issues of the instant case.

THERE IS NO CONFLICT ON THE QUESTION INVOLVED BETWEEN THE CIRCUITS OR BETWEEN THE CIRCUITS AND THE STATE, AND THIS QUESTION HAS BEEN DETERMINED HERETOFORE.

The question involved here in this case is the identical question which was posed in the case of **Continental Casualty v. U. S. for the Use of Robertson Lumber Company** (8th Cir. 1962), 305 F. 2d 794, cert. denied, 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231. In that case, and in another case in which the point was considered and certiorari was denied by the Supreme Court at the same time (**Miles Lumber Co. et al. v. Harrison and Grimshaw Construction Co. et al.** (10th Cir. 1962), 305 F. 2d 363), the problem of dual notice was fully discussed and both of the Circuit Courts determined that such a notice was a mandatory requirement prior to recovery by a material man under the bond.

In the instant case, the material man who supplied the material under the identical bond failed to give dual notice. The trial court at the time the summary judgment dismissing this case as to the sureties was entered,

which has given rise to these appeals, clearly indicated that this case was identical to the first Robertson Lumber Company case (ibid.) and Miles Lumber case (ibid.) and other similar judicial determinations.

The Petitioner here seems by inference to assert that the determination of the court in this case and in the other cases cited is contrary to the determination of the same point by the Supreme Court of North Dakota (**Ireland Lumber Yard v. Progressive Contractors et al.** (N. D. 1963), 122 N. W. 2d 554). As Judge Register, the trial judge in the instant case, pointed out, however, a careful reading of that case would not lead one to the conclusion that they were differing with the Eighth Circuit in their determination that dual notice was a prior requirement; and, in fact, a careful reading of the case would seem to suggest that the Supreme Court of North Dakota was in complete agreement with the Eighth Circuit in the Robertson case (ibid.). Therefore, it is submitted that there is no difference between the Circuits or between any Circuit Court and the State Supreme Court that would give rise to a ground for granting this Petition under Supreme Court Rule 385 (a) or (b).

THAT THE QUESTION IS MOOT, ANYWAY, BECAUSE THE CAPEHART ACT IS NO LONGER OPERATIVE.

Following the default of the Hal B. Hayes contracting complex which gave rise to the first Robertson case (ibid.) and several other cases, the Congress of the United States made an extensive review of the problem of construction of housing for military personnel on military bases; and the result of this review was that the Capehart program was abandoned as a method of such construction as the governmental and public interests did not appear to be best served by its continuance. As a result, there are extremely few cases involving any phase of Capehart con-

struction still pending in the courts and when these are finally determined, there should be little likelihood for future litigation on this type of government contract bond.

THAT THE QUESTIONS POSED BY THE PETITIONER ARE OUTSIDE THE SCOPE OF THE ISSUES OF THE INSTANT CASE.

The two questions referred to the Petitioner's Petition suggest that a question for determination by the Supreme Court on certiorari is:

> "1. Do the courts of the several states have concurrent jurisdiction with the United States District Court in suits brought on bonds issued under the Capehart Act pursuant to Title 28, United States Code, Section 1352 (62 Stat. 934, June 25, 1948, ch. 646)?" (Petition, page 5.)

The Respondents to this Petition respectfully point out to the Court that this is the first time this question has been raised and the question is not material to the determination of the issues in the lawsuit. The Court will look in vain for any suggestion in the Record of this case that the jurisdiction of the Federal Courts or the State Courts are in question and that this jurisdiction of the State Courts or the Federal Courts has any bearing on the issue of whether or not a dual notice is required under the bond that the Petitioner originally sued under.

The second question asked is equally outside the scope of the issues here. The fact of the matter is that this point was quite well met by the trial judge, the Honorable George S. Register, in the opinion he handed down at the time he granted the motion of the Respondents here for summary judgment. He stated at that time that:

> "It appears to this court that the facts in the case now before it are dissimilar to those in Ireland's.

(The only case to which the Petitioners turn to as suggesting the state courts or the state law in North Dakota would give it any succor.) The bond here involved requires that, as a condition precedent to instituting suit or action, claimant must 'have given written notice or **any two** of the following: The Principal, any one of the Obligees, or the Sureties above named, * * *.' (Emphasis supplied.) Plaintiff has failed to do so—it is conceded the only notice given was to the principal. The notice provisions of the bond were not satisfied. Such failure precludes recovery under the bond."

This being the case, there can be no merit to the Petitioner's plea that this Court should answer these questions on this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should not be granted.

Dated this 14th day of May, 1965.

Respectfully submitted,

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